

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 11, 2011

v

PHILLIP WAYNE HARDY and SHEILA KAY
HARDY,

Defendants-Appellants.

Nos. 296509, 296510
Tuscola Circuit Court
LC Nos. 09-011135-FH, 09-
011136-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PHILLIP WAYNE HARDY and SHEILA KAY
HARDY,

Defendants-Appellees.

Nos. 302136, 302137
Tuscola Circuit Court
LC Nos. 09-011135-FH, 09-
011136-FH

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

This appeal arises from the jury trial convictions of Phillip Wayne Hardy and Sheila Kay Hardy of two counts each of second-degree child abuse.¹ Following their convictions, the Hardys raised allegations of ineffective assistance of counsel and were granted a *Ginther*² hearing. The trial court concluded that the Hardys were entitled to a new trial based on the ineffectiveness of counsel in the criminal proceeding. Although the Hardys concur that they are

¹ MCL 750.136b(3). The Hardys were sentenced to concurrent prison terms of 18 months to four years.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

entitled to a new trial, they appeal and assert error regarding the trial court's failure to acknowledge that separate trials should have been conducted and the impropriety of permitting joint representation by counsel without having obtained a waiver.³ The prosecutor also contends that the trial court erred in using the wrong standard in its determination that the Hardys were entitled to a new trial based on ineffective assistance of counsel.⁴ We reverse and remand for reinstatement of the Hardys' convictions and sentences.

Phillip and Sheila Hardy are husband and wife. They were originally the foster parents and later the adoptive parents of the two minor children that were the victims in the underlying criminal action for second-degree child abuse. The most pertinent allegations of abuse included assertions that the children had been locked in a bedroom in the Hardy home, without adult supervision while the Hardys were at work, and that the children had been deprived of food as a means of punishment by the Hardys for unacceptable behavior. Additional allegations existed regarding the sanitary conditions of the home due, in part, to the children urinating and defecating in the locked bedroom, as they were unable to access a bathroom. The incident that brought the children to the attention of the Department of Human Services ("DHS") and which led to the current charges involved the children having broken out of the locked room and approaching neighbors asking for food.

We review a trial court's decision to grant a new trial for an abuse of discretion⁵, but the underlying issue of ineffective assistance of counsel presents mixed questions of fact and constitutional law, which are respectively reviewed for clear error and de novo.⁶

The Hardys contend that counsel was ineffective because he failed to interview certain witnesses or elicit their testimony at trial, procure evidence regarding the adequacy of the mental and physical health and nutrition of the minor children, and did not sufficiently prepare or communicate with the Hardys in preparation for trial. Following the *Ginther* hearing, the trial court granted the Hardys a new trial based on its determination that counsel "really didn't do [the] job that these parties expected him to do." Yet, concurrently, the trial court determined that "the evidence is overwhelming" and expressed a lack of conviction that the additional evidence or testimony proposed by the Hardys "would have changed the outcome." On appeal, the prosecutor contends that the trial court's grant of a new hearing is contrary to its findings and fails to meet the requisite standard for ineffective assistance of counsel.

"[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel."⁷ The United States Supreme Court has determined that a claim of

³ Docket Nos. 296509 and 296510.

⁴ Docket Nos. 302136 and 302137.

⁵ *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001).

⁶ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁷ *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed2d 763 (1970).

ineffective assistance of counsel is comprised of two distinct components: “First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.”⁸ To establish the first component, a defendant is required to demonstrate that the performance of his counsel fell below an objective standard of reasonableness under prevailing professional norms.⁹ To establish the second component pertaining to prejudice, a defendant must show that there exists a reasonable probability that but for counsel's errors, the outcome of the proceedings would have been different.¹⁰ A defendant must also overcome the strong presumption that his “counsel's conduct falls within the wide range of professional assistance,” and that the actions or decisions of his counsel comprised sound trial strategy.¹¹ It is a well recognized precept that defense counsel possesses “wide discretion in matters of trial strategy.”¹² As a result, this Court is not permitted to “substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence.”¹³

While the trial court's determination that counsel was ineffective for failing to investigate possible evidence and testimony available from witnesses identified by the Hardys to contradict the prosecutor's proofs is supportable, it cannot be shown that the Hardys were prejudiced by this failure. As recognized by the trial court “overwhelming evidence” was submitted to demonstrate that the minor children were detrimentally impacted by the Hardys' parenting. Photographs were submitted verifying the despicable living conditions for the children and officers involved in the investigation testified regarding the stench of urine in the children's living area. The Hardys did not deny either the existence of locks on the bedroom door or that the minor children had been left without supervision and locked in the room while both parents were at work. A psychologist that had previously evaluated one of the children testified and opined that the emotional and psychological condition of that child had deteriorated under the Hardy's care. The current foster mother for the children described hoarding of food by the children and their urinating and defecating in their bedrooms, which was consistent with behaviors exhibited by victims of the type of abuse alleged to have occurred. Further, although the Hardys contend that certain exculpatory evidence may exist to contradict the evidence submitted by the prosecution, they provide no substantive proof regarding the existence of the alleged evidence or verifying the content of the purported testimony to be offered.

Specifically, the Hardys contend that counsel was ineffective for failing to interview or investigate and call as a witness their elder son, who was not residing in the home at the time of

⁸ *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

⁹ *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

¹⁰ *Id.* at 663-664.

¹¹ *Strickland*, 466 US at 689.

¹² *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

¹³ *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

the event leading to the removal of the children from the home by DHS. The Hardys contend that the elder son's testimony would have contradicted allegations pertaining to a history of withholding of food and the locking of the children in the bedroom. At the *Ginther* hearing, counsel indicated he elected not to call the son as a witness due to concerns regarding the possibility that his testimony could ultimately be detrimental to the Hardys. We recognize:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.¹⁴

While we do not condone a lack of effort by trial counsel to investigate and procure witnesses on behalf of the Hardys, it is highly unlikely that the evidence or testimony omitted would have had a substantial or determinative impact on the outcome of trial given the strength of the case presented by the prosecution. As the Hardys failed to demonstrate the requisite component of prejudice in their assertion of ineffective assistance of counsel, the trial court erroneously granted a new trial.

In the possible anticipation of our determination regarding the trial court's error in granting a new trial, the Hardys posit two alternative bases of error by trial counsel necessitating their retrial. First, the Hardys contend that their joint representation by counsel in the original trial violated their right to the effective assistance of counsel. The applicable court rule¹⁵ states in relevant part:

Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

- (1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;
- (2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and

¹⁴ *Strickland*, 466 US at 690–691.

¹⁵ MCR 6.005(F).

(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

Although the trial court did make an inquiry regarding the issue of joint representation “at pretrial,” it acknowledged a failure to fully comply with the court rule. Despite this lack of conformance, the trial court indicated it was satisfied that joint representation made no discernable difference in the outcome of the case. The mere failure to follow the protocol established by the “court rule, in itself, does not constitute reversible error.”¹⁶

The Hardys did not raise, either before or during trial, any concerns pertaining to their joint representation by counsel. Although a conflict of interest “is never presumed or implied,”¹⁷ when a conflict of interest is found to exist that would adversely impact the sufficiency of an attorney’s performance, prejudice is presumed.¹⁸ But, “[t]o warrant reversal, the prejudice shown must be actual, not merely speculative.”¹⁹ In the circumstances of this case, there is no demonstrable conflict of interest. Both parties retained counsel and denied culpability. Their testimony and trial strategy were not in conflict and, although minor discrepancies may have existed in their testimony, overall their positions and theories of the case completely coincided. As no conflict of interest was demonstrated, any assertion of error premised on joint representation is unavailing.

Finally, the Hardys also assert ineffective assistance of counsel for the failure to seek severance of their trials. The court rules provide that “[o]n a defendant’s motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.”²⁰ In addition:

On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties’ resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties’ readiness for trial.²¹

At the outset, we note that there exists no absolute right to separate trials and that there is a strong policy that actually favors joint trials.²² Severance should be granted when defenses are

¹⁶ *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990).

¹⁷ *Id.* at 530.

¹⁸ *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998).

¹⁹ *People v Fowlkes*, 130 Mich App 828, 836; 345 NW2d 629 (1983).

²⁰ MCR 6.121(C).

²¹ MCR 6.121(D).

²² *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993).

antagonistic.²³ Defenses are deemed to be antagonistic if it appears that one defendant “may testify to exculpate [himself or herself] and to incriminate” his or her codefendant.²⁴ “Severance is mandated . . . only when a defendant provides the court with a supporting affidavit, or makes an offer of proof that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice.”²⁵ Further, “defenses not only must be inconsistent, but mutually exclusive or irreconcilable.”²⁶ As the Hardys’ defenses were fully consistent and in concert with one another and were neither mutually exclusive nor irreconcilable, there exists no basis or requirement for severance of their trials.

Reversed and remanded to the trial court for reinstatement of the Hardys’ convictions and sentences. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray

²³ *Id.*

²⁴ *Id.* at 153.

²⁵ *People v Cadle*, 209 Mich App 467, 469; 531 NW2d 761 (1995) (citation omitted).

²⁶ *Id.*